TOH BOON LENG

v.

AJIT SINGH JESSEY

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 22-236-90]
30 JULY 1990

CIVIL PROCEDURE: *Interlocutory injunction - Violation of constitution of association of which plaintiff was a member - Inexplicable delay - Irreparable damage - Relevant principles.*

The plaintiff S, is a member of HHH an association which is involved in the promotion and encouragement of the sport of cross country runs. Rule 32(a) of the HHH's Constitution prohibits females from participating in these run, normally held every Monday.

On 29 May 1980 the committee decided to hold 4 mixed runs; S, through his solicitor, wrote to the defendant reminding him of the prohibition and sought an assurance that mixed runs would not be held in the future, failing which the plaintiff threatened injunctive relief. The defendant did not comply with S's request. S then sought declarations and obtained at the same time an *ex-parte* interlocutory injunction restraining HHH from proceeding with the 4 mixed runs and restraining the participation of women in any future runs. The defendant hence applies for the discharging of the interlocutory injunction.

Held:

[1] It had been the practice since the last 18 years for HHH to hold mixed runs on Mondays and S, having been a member since February 1989, could be reasonably presumed to be aware of this practice since prior notice of mixed runs is always given to members; there is also evidence of S taking part in the mixed run held on 18 May 1989 and two mixed runs on 17 July 1989 and 1 January 1990 where he partook of refreshments with members who did participate. However, S only took action on 4 June 1990 - on the ground, of unexplained delay on S's part in moving the Court for injunctive relief, the interlocutory injunctions are discharged.

[2] The complaints which have been made by S, even if established is a triffling matter and can in no way amount to irreparable damage within the meaning of the case law.

[3] In addition, since HHH was amending the constitution to specifically empowering organisation of mixed runs, there is no necessity for an interlocutory injunction.

[Interlocutory injunctions discharged.]

Cases referred to:

Woodford and Anor. v. Smith and Anor. [1970] 1 All ER 1091
Bates v. Lord Hailsham and Ors. [1972] 1 WLR 1373
Johnson v. Shrewsbury and Birmingham Ruy Co. [1853] 43 ER 358
Pinchin v. London and Blackwall Railway Co. [1854] 43 ER 1101
Brightside Mechanical and Electrical Services Group Ltd. & Anor. v. Standard Chartered Bank & Anor. [1989] 3 MLJ 13
AG. v. Hallett 153 ER 1316

For the plaintiff - K. Balasundaram (Peter Miranda with him); M/s. Peter Miranda & Co.
For the defendant - R. Manecksha; M/s. Ong & Manecksha

JUDGMENT

Edgar Joseph Jr J:

The plaintiff who rejoices in the nick name "Spider" is an ordinary member of the Hash House Harriers, Penang, ("HHH"), an association whose avowed objects are, according to its Constitution; (a) to promote and encourage the sport of cross-country running in Penang by the organisation of regular cross-country paper chases and in any other way in pursuit of this object decided by the Committee, and (b) to meet socially from time to time to entertain members, guests and their ladies. By para. (a) of r. 32 of the Constitution, sub-entitled, "Prohibition", it is provided, *inter alia*, that "the introduction of materials for gambling or opium smoking and of females and bad characters on the runs is prohibited".

It is common ground that the practice of HHH has been to hold the weekly runs on Mondays.

On 29 May 1990, the Committee of HHH decided - over the protestations of the plaintiff - to hold mixed runs; that is to say, runs permitting the participation of females on 2 July 1990, 16 July 1990, 1 October 1990 and 24 December 1990 - all Mondays.

The plaintiff did not let the matter rest there for he consulted his solicitors who, upon his instructions, sent a letter dated 4 June 1990 (Ex. T4 to encl. 2) addressed to Mr. Ajit Singh Jessey, the secretary of HHH and the defendant herein, reminding him that the introduction of females on runs was prohibited under the Association's Constitution and seeking an assurance that mixed runs would not be permitted in the future. There was also an ultimatum that unless the Committee gave an assurance that mixed runs would not be held in the future, the plaintiff would move the Court for injunctive relief.

That letter evoked a curt response from the secretary dated 12 June 1990 (Ex. T 5 to encl. 2) stating that HHH is a social club, that ladies had in the past been invited to runs organised by it, and would be so invited in the future and it would be absurd to seek injunctive relief.

In consequence, the plaintiff caused to be issued a writ of summons against the above named defendant as secretary of HHH, claiming:

(a) a declaration that the Committee of HHH Penang, had acted *ultra vires* the powers conferred upon them by the Constitution when they decided to organise mixed runs as aforesaid;

(b) a declaration that the committee of HHH are not permitted to allow women to take part in the runs scheduled for 2 July 1990, 16 July 1990, 1 October 1990 and 24 December 1990 or to allow mixed runs on every Monday thereafter.

(c) Damages.

At the same time, the plaintiff applied *ex parte*, by summons in chambers supported by affidavit, and obtained an interlocutory injunction restraining the Committee of HHH from proceeding with the mixed runs scheduled for 2 July 1990, 16 July 1990, 1 October 1990 and 24 December 1990 and a further injunction restraining it from permitting women to take part on every Monday run in the future until the determination of this suit or until further order.

When granting the interlocutory injunctions I reminded myself that although this was a mere domestic dispute in a local association, with no matter of principle in issue, and those like the plaintiff who did not like what had been done could go off and form a new association, instead of having recourse to the remedy of injunction, nevertheless this was a case, where

the plaintiff had alleged a violation of the Association's Constitution, in consequence of which his membership rights had been affected, and so there was, *prima facie*, a basis for judicial intervention by way of interlocutory injunction. (See *Woodford and Anor. v. Smith and Anor* [1970] 1 AER 1091, 1092 per Megarry J.)

The summons in chambers now before me is by the defendant and seeks to discharge the interlocutory injunctions aforesaid. I need hardly say that the material now before me is far more substantial than at the *ex parte* stage and I also have had the advantage of listening to a full argument by Counsel on both sides.

In his affidavit affirmed on 5 July 1990 (encl. 5) the defendant has stated, *inter alia*, that for many years HHH had invited members of the Hash House Harriets (an organisation of ladies with similar objects to those of HHH) to runs on public holidays and that the plaintiff had himself willingly participated in such runs.

The defendant has further stated that these invitation runs had been organised so as to enable members of HHH to meet and participate with lady runners in activities in which a common interest was apparent. It also enabled husbands and wives to run together.

The effect of the injunctions, being continued, the defendant argued, would be to curtail the social activities of HHH, and he failed to see what damage the plaintiff would suffer if such runs were continued.

Finally, the defendant stated that the vast majority, if not all members of HHH, looked forward to mixed runs.

In an affidavit in opposition, the plaintiff stated, *inter alia*, that the membership of HHH was in fact split over the issue of mixed runs and that a large section of members had offered him moral and financial support over the issue. He added that although he had been present at mixed runs it was not true that he had participated in any of them; in fact, he added, that as early as May or June 1989, he had circulated several open letters (in "colourful" and "blue" language that being the "credo" of HHH, as he puts it) to his fellow Hashmen registering his objection to mixed runs.

Explaining why he objected to mixed runs, the plaintiff went on to say that the presence of lady runners and wives of members at mixed runs had resulted in conflicts between members in the past. These conflicts, he said, arose as a result of the use of vulgar and abusive language (a common feature at the runs) in the presence of lady guests, which gave offence to their host members. Furthermore, he added, that because of the presence of ladies at the mixed runs, he "could not do the things he did at the normal runs, like changing and answering the call of nature undisturbed, exchanging dirty jokes etc" - activities being "part and parcel of the weekly Monday run".

In an affidavit in reply dated 14 July 1990 (encl. 14) the defendant said he had been a member of HHH since February 1987 and was aware that its Committee had organised mixed runs for about 18 years.

At the hearing of the present application to discharge the interlocutory injunctions the plaintiff was cross-examined upon his affidavits, pursuant to leave granted by me, in the course of which he admitted that he had run in a mixed run organised by HHH held on Monday, 18 May 1989. He also admitted that on Monday, 17 July 1989, another mixed run was held but he did not run though he did partake of the refreshments offered after members returned

from the run; to quote him, "I went to have my beers and at the same time have some chit chat with my friends". Similarly, he admitted that on Monday, 1 January 1990 he did attend a mixed run and partook of the refreshments though he did not himself run.

He agreed with Counsel for the defendant that he could only have his beers after members returned from the run. He did not consider that drinking beer with members who had just engaged in a mixed run amounted to participating in it. I should have thought that a more appropriate line of questioning would have been whether partaking of refreshments and in chit chat with members who had just taken part in a mixed run, suggested, that the plaintiff had "turned a blind eye", as it were to the breaches of the Constitution, he was complaining about. However, I do not wish to place undue stress on this point and mention it only in passing as it may have a bearing on the question whether the plaintiff could satisfy the Court that not to continue the interlocutory injunctions would result in his suffering irreparable harm - a point I shall be discussing later.

First of all, I shall consider the question, given the facts aforesaid, whether the plaintiff had moved the Court for the interlocutory injunctions with sufficient promptitude.

The defendant has stated in his affidavit, without challenge (although leave was given to cross-examine him), that it had been the practice since the last 18 years for HHH to hold mixed runs on Mondays.

The plaintiff having been a member since February 1989 could be reasonably presumed to be aware of this practice to hold mixed runs on Mondays prior notice of which, I was told, is always given to members. There is also the evidence that the plaintiff did take part in mixed run held on Monday, 18 May 1989, though admittedly under protest. Then there were the mixed Monday runs of 17 July 1989 and 1 January 1990 in both which the plaintiff claims that he did not take part though he admits he partook of the refreshments thereafter with members who did take part in them. Yet it was only on 4 June 1990 that the plaintiff bestirred himself when his solicitors wrote to the defendant the letter hereinbefore mentioned, threatening legal proceedings for injunctive relief in the event of no assurance being given that mixed runs would be discontinued. Then, on 12 June 1990, came the reply from the defendant declining the assurance sought. Some fifteen days later, the plaintiff caused to be issued the writ of summons herein.

Given the chronology of events I have just stated, the inevitable question which arises is: what were the reasons for the inaction and delay on the part of the plaintiff in seeking legal redress by way of injunctive relief? None were vouchsafed to this Court although it has frequently been said that since *ex parte* injunctions are for cases of real emergency, where there has been a true impossibility of giving notice, an *ex parte* order after notice would be a contradiction in terms. To put it another way, the applicant must need the Court's protection immediately. It follows, therefore, that if the applicant has delayed with knowledge of the facts before coming to Court, an injunction will be refused, even where the defendant would not be inconvenienced by the restraint; promptness is therefore a *sine qua non*. (See *Bates v. Lord Hailsham and Ors.* [1972] 1 WLR 1373).

In the circumstances, I would on the ground of unexplained delay on the part of the plaintiff in moving the Court for injunctive relief, discharge the interlocutory injunctions.

Secondly, it is often said that in order to establish the right to an interlocutory injunction the plaintiff must be able to show that he is sufficiently threatened with irreparable damage. (See *Johnson v. Shrewsbury and Birmingham Ruy Co.* [1853] 43 ER 358 at p. 363). It was

Lord Cranworth who once observed that by an irreparable injury was meant one that was "a very grevious injury indeed". (See *Pinchin v. London and Blackwall Railway Co.* [1854] 43 ER 1101 at p. 1104). In *Brightside Mechanical and Electrical Services Group Ltd. & Anor. v. Standard Chartered Bank & Anor.* [1989] 3 MLJ 13 at p. 17, a building contract case involving the question whether a guarantee had to be provided during the defects liability period, Chan Sek Keong J said:

> Assuming however that these are triable issues, the first plaintiffs have still to persuade the Court that they will suffer irreparable harm if the interlocutory injunction were not granted. The first plaintiffs plea is one of hardship and injustice i.e., they have a claim for more than RM119 million against the second defendants for which they have not been paid and yet they are being required to pay another RM5 million to the second defendants. On the authorities, the test is not mere hardship to the first plaintiffs but irreparable harm to them.

I would add that irreparable injury is such an injury as could not be compensated in damages. (See *AG. v. Hallett* 153 ER 1316 at p. 1321 per Barke B.) Moreover, when the relative smallness of expected damage or inconvenience to the plaintiff leads to the refusal of relief, that refusal depends in truth on more general considerations involving the balance of convenience.

I must now address the particular circumstances of the present case.

In his initial affidavit on the strength of which the plaintiff obtained the interlocutory injunctions, the plaintiff had contended that as a result of the arbitrary decision of the HHH Committee made on 29 May 1990, to hold mixed runs on 2 July 1990, 16 July 1990 and 1 October 1990 - all Mondays - there had been a failure to observe the provisions of r. 32(b) of the Constitution and therefore his basic right to enjoy the facilities and amenities in the company of men as provided for therein was being infringed. The plaintiff added that on previous mixed runs he encountered some very embarrassing moments because of the presence of female runners, as a result of which he suffered distress and severe mental anguish. The plaintiff studiously refrained from mentioning that HHH had been holding mixed runs on Mondays for years nor did he condescend to mention what those embarrassing moments were. It now appears from his second affidavit filed in opposition to the application by the defendant to discharge the injunctions that by "embarrassing moments" the plaintiff meant that he could not do the things he did at the normal runs like changing and answering the call of nature undisturbed and exchanging dirty jokes etc.

Furthermore, at the *inter partes* stage, the plaintiff had said under cross-examination" we are an only men's club and we don't run with ladies on Mondays". In answer to the Court he added: "Yes, on other days there is no objection to running with ladies. ... Those who wish to run with ladies can do so on any days except Mondays." This was something the plaintiff did not disclose to the Court when he sought for and obtained the *ex parte* interlocutory injunctions.

I would, therefore, agree that the matter of which complaint has been made by the plaintiff even if established is a trifling matter - a storm in a teacup - and can in no way amount to irreparable damage within the meaning of the authorities. If the plaintiff is troubled by the presence of ladies at the Mondays runs, all he has to do is to stay away from those runs. Rule 32(b) which is the linch pin in the plaintiff's case has, in reality, become a dead letter as it appears that the HHH Committee has been holding mixed runs for the past 18 years. The maxim *de minimis non curat lex* (the law does not take notice of trifles) applies and, on this further ground also, I would discharge the interlocutory injunctions.

Lastly, during the argument, in answer to the Court, Counsel for the plaintiff frankly conceded that this action was not likely to go to trial and he understood that there was a move by the HHH Committee to amend the Constitution with a view to specifically empowering it to organise mixed runs. Counsel for the defendant confirmed that such a move was afoot. If this is so, I fail to see the necessity for an interlocutory injunction - the whole purpose of which is that it is a holding measure designed to preserve the *status quo* pending the determination of the suit. This is yet another ground for discharging the interlocutory injunctions.

In all the circumstances, regard being had to the relevant principles, not forgetting the balance of convenience, the interests of all parties concerned always keeping in mind the foreseeable positions at the final hearing, considerations of hardship in the meantime and other relevant discretionary factors, I am satisfied that there are no sufficient grounds for continuing in force the injunctions.

In the result, I would make an order in terms of the defendant's application.

Also found at [1990] 2 CLJ 862